

APPEAL NO. 030768-s
FILED MAY 8, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 26, 2003. With respect to the issues before him, the hearing officer determined that the appellant (claimant) sustained a compensable injury on _____; that he had disability, as a result of his compensable injury, from October 17, 2002, through the date of the hearing; and that the respondent (carrier) did not waive its right to contest compensability pursuant to Section 409.021 and Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002). In his appeal, the claimant asserts error in the hearing officer's determination that the carrier did not waive its right to contest compensability in this instance. In its response to the claimant's appeal, the carrier urges affirmance. The carrier did not appeal the hearing officer's determinations that the claimant sustained a compensable injury on _____, and that he had disability from October 17, 2002, through the date of the hearing and those determinations have, therefore, become final. Section 410.169.

DECISION

Reversed and remanded.

As noted above, the only issue before us on appeal is the issue of whether the carrier waived its right to contest compensability pursuant to Section 409.021 and Downs. The facts in this case are largely undisputed. The carrier received its first written notice of the claimant's claimed _____, injury on October 18, 2002. On the same day, the carrier electronically filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission) stating that it "will pay benefits if, as, and when they accrue, subject to further investigation." On October 25, 2002, the carrier completed a second TWCC-21 contesting compensability of the claimant's injury, which is date-stamped as having been received by the Commission on October 28, 2002. The boxes at the bottom of both the October 18th and October 25th TWCC-21s state that a copy of the document was mailed to the claimant. However, the claimant testified that he did not receive a copy of either of the TWCC-21s. The claimant's disability began on October 17, 2002. On December 13, 2002, the carrier mailed the first payment of temporary income benefits (TIBs) to the claimant for a six-day period from October 23 to October 28, 2002.

The claimant initially argues that the hearing officer erred in determining that the carrier did not waive its right to contest compensability pursuant to Section 409.021 and Downs because the carrier did not send a copy of the October 18, 2002, TWCC-21 to the claimant. We cannot agree with the claimant's assertion that Section 409.021 requires that a TWCC-21 stating that the carrier will initiate benefits as they accrue has to be filed with the claimant. Section 409.021(a)(1) and (a)(2) provide, in relevant part,

that “[n]ot later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall begin the payment of benefits as required by this subtitle; or notify the commission **and the employee** in writing of its refusal to pay. . . .” (Emphasis added.) By its plain language, Section 409.021(a) only requires notice to the Commission and the claimant when the carrier is refusing to pay benefits. In addition, Section 409.021(b) requires that the carrier “notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.” There simply is no requirement for the carrier to send notice to the claimant of its intent to pay benefits. Accordingly, we reject the argument that the carrier’s alleged failure to send a copy of the October 18, 2001, TWCC-21 to the claimant within seven days of the date it received its first written notice of the injury results in its waiver of the right to contest compensability. See Texas Workers' Compensation Commission Appeal No. 030697, decided April 30, 2003.

The claimant also argues that the carrier waived the right to contest compensability in this instance because it did not pay the claimant’s TIBs as they accrued but rather sent the TIBs payment to the claimant for the period from October 23 to October 28, 2002, on December 13, 2002. We previously considered and rejected that argument in Texas Workers' Compensation Commission Appeal No. 022375-s, decided October 31, 2002. In this case, as in Appeal No. 022375-s, the carrier filed an initial TWCC-21 within seven days of the date it received written notice of the claim stating it would pay benefits when they accrued. Thereafter, and within 60 days of the date it received written notice of the injury, the carrier filed a second TWCC-21 contesting compensability of the injury. In Appeal No. 022375-s we rejected the argument that by failing to pay the benefits when they accrued, the carrier had waived its right to contest compensability. Rather, we held that the carrier was liable for all medical and income benefits that accrued prior to the date the notice of denial was filed. In this instance, the carrier paid the claimant TIBs for the period from October 23 to October 28, 2002, the date the TWCC-21 contesting compensability was filed with the Commission. Thus, under the reasoning of Appeal No. 022375-s, the carrier did not waive its right to contest compensability based on the delayed payment of benefits.

Lastly, the claimant contends that the carrier waived its right to contest compensability because it did not send a copy of the October 25, 2002, TWCC-21 to the claimant. In addressing this argument, the hearing officer committed error. In Finding of Fact No. 7, the hearing officer stated “[t]he Carrier was not required to send the Claimant a copy of its TWCC-21 form in order for the Carrier to timely contest the compensability of the claimed injury.” Similarly, the hearing officer stated in his discussion that he could find no authority for the requirement that the carrier send a copy of the TWCC-21 to the claimant in Section 409.021 or Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3). As noted above, the plain language of Section 409.021(a)(2) requires that a notice of refusal to pay benefits be sent to the claimant as well as the Commission. Likewise, Rule 124.3(a) provides that “if the carrier believes that it is not liable for the injury or that the injury was not compensable, the carrier shall file the notice of denial of a claim (notice of denial) in the form and manner prescribed by § 124.2 of this title (relating to Carrier Reporting and Notification

Requirement).” Rule 124.2(d) provides that the carrier “shall notify the Commission and the claimant of a denial of the claim (Denial) based on non-compensability or lack of coverage. . . .” Thus, it is apparent that the carrier is required to provide notice to the claimant of its contest of compensability. The question remains as to the time limit for the carrier to provide notice of the dispute of compensability to the claimant where, as here, the carrier agreed within the 7-day period to pay benefits, but then contested compensability of the injury within the 60-day period. Neither Section 409.021 nor Rule 124.2 directly answer that question. However, subsection (g) of Rule 124.2 provides some guidance. It states:

Notification to the Commission as required by subsections (c), (d) and (e) of this section requires the carrier to use electronic filing, as that term is used in § 102.5(e) of this title. In addition to the electronic filing requirements of this subsection, when a carrier notifies the Commission of a denial as required by subsection (d) of this section, it must provide the Commission a written copy of the notice provided to the claimant under subsection (f) of this section. The notification requirements of this section are not considered completed until the copy of the notice provided to the claimant is received by the Commission.

Since the carrier’s notification requirements are not considered completed until the copy of the denial provided to the claimant is received by the Commission, it follows that the notice to the claimant must be provided within the 60-day period provided for contesting compensability. There is no doubt that the carrier herein was required to file its contest of compensability with the Commission within the 60-day period or waive its right to contest compensability in accordance with Section 409.021(c). From our reading of Section 409.021 and Rule 124.2, it appears that they contemplate that the required notification of denial to the claimant will be accomplished either at the same time as notification to the Commission or within a short time thereafter. Accordingly, we believe that the 60th day after the carrier received written notice of the injury would be the outside limit for the carrier to give notice of the denial to the claimant as that is the outside limit for providing the notice of the denial to the Commission.

The claimant testified that he did not receive a copy of the October 25, 2002, TWCC-21. If it is true that the claimant did not timely receive notice of the denial of the claim, then the carrier has waived the right to contest compensability in this case. See, e.g., Texas Workers' Compensation Commission Appeal No. 023262, decided February 19, 2003 (where we rendered a determination that the carrier had waived the right to contest compensability because the record did not reflect that the carrier had timely sent notice to the claimant of the contest of compensability it filed with the Commission within the 7-day period following written notice of the claimed injury). The hearing officer was presented with the question of whether the claimant received a copy of the TWCC-21; however, he did not resolve that issue based upon his erroneous belief that the carrier was not required to give such notice to the claimant. Thus, we remand for the hearing officer to resolve the question of whether and when the claimant received a copy of the

October 25, 2002, TWCC-21. The resolution of that issue will resolve the carrier waiver issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **COMMERCE & INDUSTRY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge